
IN THE
SUPREME COURT OF ILLINOIS

SHARON PRICE and MICHAEL FRUTH,)	
<i>et al.</i> ,)	
)	On Direct Appeal from the
Plaintiffs-Appellees,)	Circuit Court of the
)	Third Judicial Circuit,
v.)	Madison County, Illinois
)	
PHILIP MORRIS INCORPORATED,)	No. 00 L 112
)	
Defendant-Appellant.)	Nicholas G. Byron,
)	Judge Presiding

BRIEF OF WASHINGTON UNIVERSITY (ST. LOUIS) SCHOOL OF LAW, ST. LOUIS UNIVERSITY SCHOOL OF LAW, UNIVERSITY OF ILLINOIS COLLEGE OF LAW, SOUTHERN ILLINOIS UNIVERSITY SCHOOL OF LAW, NORTHERN ILLINOIS UNIVERSITY COLLEGE OF LAW, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, UNIVERSITY OF CHICAGO LAW SCHOOL, THE JOHN MARSHALL SCHOOL OF LAW, CHICAGO-KENT COLLEGE OF LAW (I.I.T.), DEPAUL UNIVERSITY COLLEGE OF LAW AND LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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Pursuant to Illinois Supreme Court Rule 345, the law schools respectfully submit this brief as *amici curiae* in support of the brief filed by the Plaintiffs-Appellees.

INTRODUCTION

On March 21, 2003, Judge Nicholas Byron entered a Judgment in the case on appeal, which ordered in pertinent part:

7. That in the event there should remain unclaimed funds in the compensatory award rendered herein, then, under the Doctrine of Cy Pres, all said unclaimed funds, when so finally determined by this Court, hereby, are ordered then to be distributed to the following institutions through the Illinois Bar Foundation. Whereupon, the Illinois Bar Foundation is, hereby, appointed to receive, account, protect and so distribute said funds. The distribution of these funds is ordered as follows:

(1) Three percent (3%) to each of the following Law Schools for enhancing studies concerned with the protection of the consumer and with other socio-economic areas of law. Said funds may also be used for providing financial assistance to needy law students. (The total of this award is thirty-three percent (33)):

Washington University (St. Louis) School of Law
St. Louis University School of Law
University of Illinois College of Law
Southern Illinois University School of Law
Northern Illinois University College of Law
Northwestern University School of Law
University of Chicago Law School
The John Marshall School of Law
Chicago-Kent College of Law (I.I.T.)
DePaul University College of Law
Loyola University Chicago School of Law

Amici Curiae, the eleven named law schools, join in filing this brief in support of the Court's cy pres distribution of unclaimed funds.

ARGUMENT

I. CY PRES DISTRIBUTION IS A WELL ESTABLISHED DOCTRINE IN AMERICAN JURISPRUDENCE AND HAS BEEN RECOGNIZED BY ILLINOIS COURTS AND THE SEVENTH CIRCUIT

“Cy pres” is a term derived from the French phrase *cy pres comme possible*, which translates to “as near as possible.” Although it was originally used in the context of charitable trusts, over the past three decades it has become a popular mechanism for distribution of some or all of the damages in class action cases. The power to order a cy pres distribution emanates from the court’s general equitable powers. 3 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 10:16 (4th ed. 2003). Moreover, the formula for application of the remedy to the unclaimed portion of a class action case has been described by an Illinois Appellate Court as follows:

(1) the amount of damages incurred by the class as a whole is determined in a single adjudication, creating a damage fund; (2) individual member claimants capable of proving valid claims obtain their share of the fund; and (3) the unclaimed portion of the fund is applied to the class’s benefit.

Gordon v. Boden, 224 Ill. App. 3d 195, 205, 586 N.E.2d 461, 467 (1st Dist. 1991) (citing *Cicelski v. Sears, Roebuck & Co.*, 348 N.W.2d 685, 689 (Mich. Ct. App. 1984)). In consumer class action cases where the number of injured claimants is high but the amount of actual individual damage is quite low, some courts have used the cy pres doctrine, or “fluid recovery” mechanism,¹ to disburse all of the compensatory damage fund²; however, that is not the present circumstance and we need not address the relative merits of suits which *only* compensate class

¹ “Fluid recovery” is a term used interchangeably with “cy pres” to describe distributions for the indirect benefit of class members. It is also used, however, to describe aspects of common proof in class actions and is, therefore, a more confusing term than “cy pres.” Newberg & Conte, *supra* p.2, § 10:17.

² For example, in *New York v. Salton, Inc.*, 265 F. Supp. 2d 310 (S.D.N.Y. 2003), eight million dollars in compensatory damages was paid to states to distribute cy pres to non-profit or governmental entities. Similarly, in *Boyle v. Giral*, 820 A.2d 561 (D.C. 2003), the Court approved a cy pres distribution of the entire consumer damage fund in an antitrust case involving the sale of vitamins to the D. C. Corporation Counsel to be used for the improvement of the health and/or nutrition of the citizens of the District of Columbia generally.

members through cy pres distribution. Here, the Court ordered Defendant Philip Morris, Inc., to pay compensatory damages in the sum of 7.1005 billion dollars to the class members. Realizing the possibility that not all of that sum would be claimed, the Court anticipated a cy pres distribution of any residual unclaimed funds.

The issue to be decided by this Court is whether the trial court abused its discretion in ordering that any unclaimed portion of the damage fund be used to indirectly benefit the class members through an award to, *inter alia*, eleven regional law schools to enhance consumer protection/socio-economic legal studies and to provide financial assistance for needy law students. As discussed below, the trial court did not abuse its discretion in finding it more equitable to distribute any unclaimed portion of the damage fund in trust for the indirect benefit of the class members rather than to allow a reversion to the Defendant Philip Morris.

Given the complexities of class action cases and the possibility that not all class members will claim the damages due them, courts must face the dilemma of how to equitably dispose of any unclaimed portion of the compensatory damage fund while conserving precious judicial resources. As the Court reflected in *In re Folding Carton Antitrust Litigation*, 557 F. Supp. 1091, 1104 (N.D. Ill. 1983)³:

It is well recognized that the administration of class actions . . . will present novel and unanticipated administrative difficulties. We are admonished to respond with flexibility and imagination. That admonition reflects in part the equitable origin of the class action device, a setting characterized by innovation consistent with settled principles.

In this case, the Court solved that dilemma with a cy pres distribution plan that is flexible, imaginative and consistent with the following settled principles.

³ Although the Seventh Circuit reversed the decision of the district court to award six million dollars in a damage reserve fund to establish an anti-trust foundation, it specifically approved the lower court's use of the cy pres doctrine to distribute the unclaimed funds. After three appeals, that Court approved a cy pres distribution of the remaining 2.3 million dollars in the fund to the National Association for Public Interest Law (NAPIL) to establish an Equal Justice Fellowship program.

First, *Newberg on Class Actions* provides:

In cases where the parties have not agreed as part of a settlement for the disposition of such unclaimed balance, the court may order reversion of the unclaimed fund balance to the defendants or may order the residual monies to be distributed to a use completely unrelated to the injured class members, such as to an educational institution, to a recognized charity or public service organization, or to the general treasury of the local or state government.

Newberg & Conte, *supra* p.2, § 10:24. Elsewhere in the Newberg treatise on class actions is the recognition that “cy pres . . . distributions of unclaimed class funds have found growing acceptance among the laws, procedural rules, and precedents of various states, as well as express authorization in federal statutes.” *Id.* § 10:25.

In addition to the Illinois Appellate Courts (see *Gordon*, 224 Ill. App. 3d at 195 586 N.E.2d at 467), the Seventh Circuit also has approved the use of cy pres distribution in class action cases. In *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981), the Court prescribed a case-by-case analysis to determine if cy pres distribution is consistent with the policies reflected by the statute violated.⁴ Where a statute embodies policies of compensation, deterrence and disgorgement, cy pres is an appropriate remedy, according to the decision in *Simer*. *Id.* at 677 (“those cases where a corporate defendant engages in unlawful conduct and illegally profits is [sic] most appropriate for a fluid recovery.”)

II. THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT EMBODIES POLICIES OF COMPENSATION, DETERRENCE AND DISGORGEMENT OF PROFITS; THEREFORE, CY PRES DISTRIBUTION OF UNCLAIMED FUNDS IS AN APPROPRIATE REMEDY IN CONSUMER CLASS ACTIONS BASED UPON A VIOLATION OF THAT ACT

Gordon v. Boden, 224 Ill. App. 3d 195, 586 N.E.2d 461 (1st Dist. 1991) is particularly instructive on the issue of the applicability of the cy pres doctrine to a consumer class action

⁴ It should be noted that the *Simer* case involved a claim where the statute allegedly violated (*i.e.*, the Emergency Energy Conservation Services Program) had no underlying policy of deterrence or disgorgement; the Court, therefore, determined that fluid recovery was an inappropriate mechanism in that case.

predicated on violations of the Illinois Consumer Fraud and Deceptive Business Practices Act. The plaintiffs in the *Gordon* case were members of a nationwide class who purchased adulterated orange juice products from the defendant manufacturer. The plaintiffs alleged that between 1978 and 1985, the defendant knowingly represented that its products were processed from 100% orange juice, when, in fact, it had adulterated the juice with 40% beet sugar, corn sugar, monosodium glutamate and other low-cost inferior ingredients. Discussing the defendant's violations of the Illinois Consumer Fraud and Deceptive Practices Act in that case, the Court held that those Acts are remedial as well as regulatory and are intended to provide injured individuals with a damage remedy, as well as to curb fraud. The Court concluded:

Section 11a of the Act provides that “[the] Act be liberally construed to effect the purposes thereof.” It is quite established that “[t]he provision is a clear mandate from the Illinois legislature that our courts utilize the Act to the utmost degree in eradicating all forms of deceptive and unfair business practices and grant appropriate remedies to injured parties.” This legislative intent and mandate necessarily includes policies of deterrence, disgorgement, and compensation. Thus, we hold that fluid recovery is available in at least the claim brought under the Consumer Fraud Act.

Id. at 206, 586 N.E.2d at 468 (citations omitted).

In *Simer*, the Seventh Circuit specifically declared that “those cases where a corporate defendant engages in unlawful conduct and illegally profits is [sic] most appropriate for a fluid recovery.” 661 F.2d at 677. According to *Gordon v. Boden*, the Illinois Consumer Fraud and Deceptive Business Practices Act clearly mandates policies of compensation, deterrence and disgorgement. *Id.* at 206, 586 N.E.2d at 468. Therefore, it logically follows that cy pres is an appropriate remedy in the instant case, where the only statute upon which the Court's Judgment is based is a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.

III. PUBLIC POLICY DICTATES THAT THE CY PRES AWARD IN THIS CASE BE AFFIRMED

In an insightful article on the subject of cy pres distribution of unclaimed damage awards in consumer class action cases, Natalie DeJarlais examines the common complaint that cy pres awards constitute what some might consider a “windfall” to third parties. “Clearly, windfall is inevitable in a cy pres distribution of damages or settlement funds. The true question, then, is whether the undesirability of a windfall to third parties is outweighed by the positive effects of cy pres distribution.” Natalie A. DeJarlais, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 Hastings L.J. 729, 741-42 (1987). The author answers the question by concluding that policies of disgorgement of illegally obtained profits and deterrence inherent in most consumer protection laws justify the allocation of any unclaimed funds to third parties. *Id.* She clarifies the issue by noting that the alternative, *i.e.*, reversion, would allow a defendant to keep its illegally obtained profits, which would amount to a windfall to the wrongdoer. *Id.*; *see also* Newberg & Conte, *supra* p. 2, § 10:17 (discussion of reversion as contrary to the important deterrence objective of consumer protection laws); *Id.* § 18:54 (discussion of reversion as unjust enrichment of the wrongdoer); *Id.* § 10:24 (cy pres is not a forfeiture but rather is a “part of the process disgorgement of unlawful gains”). As between the two alternatives, reversion contravenes public policy while cy pres distribution enhances it.

Others agree. For example, in *The State of California v. Levi Strauss & Co.*, 715 P.2d 564 (1986), the state attorney general filed a class action suit against a jeans manufacturer for overcharging its customers. Upholding the trial court’s application of the cy pres doctrine to establish a consumer trust fund,⁵ the California Supreme Court noted that “[f]luid recovery may

⁵ A consumer trust fund directs funds to specific organizations capable of using them for a project aimed at benefiting class members. Stan Karas, *The Role of Fluid Recovery in Consumer Protection Litigation: Kraus v.*

be essential to ensure that the policies of disgorgement or deterrence are realized. Without fluid recovery, defendants may be permitted to retain ill gotten gains . . . ” *Id.* at 571 (citations omitted). Likewise, in *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), the Court rejected the notion of reversion since that would contravene the deterrence objective of the Farm Labor Contractor Registration Act violated in that case.⁶

Thus, in a consumer class action case where the statutory objectives include enforcement, deterrence or disgorgement goals, a cy pres distribution of unclaimed funds is clearly the superior and only viable method of achieving the public policy objectives of the statute. Newberg & Conte, *supra* p. 2, § 10:24 (cy pres distribution is not a forfeiture but rather is a “part of the process of disgorgement of unlawful gains.”).⁷ In addition, the goal of deterrence may be achieved “if the unclaimed residue of an aggregate class recovery is distributed indirectly for the benefit of class members under cy pres notions . . . or is distributed in the sound discretion of the court to some other nonprofit, tax-exempt institution or organization serving the general public.” *Id.* § 10:24.

Finally, it should be noted that the public policy objectives mentioned above apply equally to cases which are litigated as well as to those which are settled. The authoritative treatise on Class Actions provides that cy pres distribution may be appropriate “[w]hen a litigated or settled aggregate class recovery cannot feasibly be distributed to individual class members or when a balance of a class recovery remains following individual distribution.” *Id.* § 10:17. For instance, in its recent decision in *Fogie v. Thorn Americas, Inc.*, No. 3-94-359-MJD,

Trinity Management Services, 90 Calif. L. Rev. 959, 971 (2002). In the article, the author refers to fluid recovery as “a pragmatic and efficient way of restoring equities and serving the goals of consumer protection.” *Id.* at 963.

⁶ Although the Ninth Circuit approved the use of the cy pres doctrine to dispose of unclaimed compensatory funds in the case, it remanded the matter for reselection of the cy pres recipient. *See infra*, Part IV.

⁷ In response to Defendant’s Argument in its brief that the cy pres award amounts to an additional punishment, disgorgement of profits through a cy pres distribution is conceptually distinct from the concept of punitive damages. The distinction explains why the former is an appropriate compensatory remedy in the same case where a punitive damage award may be imposed to punish the defendant for a grievous social wrong it has committed.

2001 WL 1617964 (D. Minn. Mar. 9, 2001), the United States District Court for the District of Minnesota ordered a cy pres distribution of undeliverable compensatory funds in a litigated class action based upon the defendant's deceptive and unlawful business practices in its "rent-to-own" business. The Court held that reversion to the defendant would be inappropriate, reasoning as follows:

Under these circumstances, allowing Defendants to retain such ill-gotten gains is completely contrary to the final judgment of this Court, and the goals of Minnesota's Usury Statute, which is to deter business entities from charging excessive interest rates to consumers.

Id. at *2. Thus, the Court denied Defendant's Motion requesting reversion of the undeliverable funds and instead awarded the Minnesota Justice Foundation the entire balance in the fund to provide law clerk assistance to lawyers representing low-income clients in consumer protection and related areas.

Ultimately, the debate over the application of the cy pres doctrine to disburse unclaimed funds in consumer class actions comes down to a balancing of interests to achieve defined public policy goals. As noted by a recent author on the subject:

It is a legal fiction that the procedures of mass litigation ensure a fair adjudication of every individual claim. Considerations of efficiency lead courts to treat the interests of the class as unified and stable instead of providing every plaintiff with 'his day in court.' Fluid recovery merely extends this concept to the remedy stage. As Professors Robinson and Abraham assert, 'Tort law should sacrifice a measure of corrective justice—conceived as full individualization—in order to achieve more efficient forms of adjudication and more even-handed distribution of compensation.' . . . [G]iven the expense and, ultimately, wastefulness of individual restitution in mass consumer protection actions, fluid recovery is a pragmatic tool to ensure disgorgement and deterrence

Karas, *supra* note 6, at 989 (citations omitted). In balancing the interests, this Court must decide whether it is preferable to indirectly benefit class members or to allow a corporate defendant who has been found to have committed fraud on Illinois consumers to keep its ill-gotten gains.

Clearly, the legislative intent in creating the Illinois Consumer Fraud and Deceptive Business Practices Act was to address the societal harm that attends fraud, such as the one upon which this action is based. *Amici* submit that in order to fully enforce that legislative intent, Defendant Philip Morris should not be awarded a windfall reversion of the unclaimed compensatory damages. Rather, this Court should uphold the use of the cy pres doctrine in this case and affirm the award entrusting the unclaimed compensatory damages to the various organizations and for the various purposes named by Judge Byron in his Judgment of March 21, 2003.

IV. THE PARTICULAR USES FOR THE CY PRES DISTRIBUTION IN THIS CASE ARE APPROPRIATE APPLICATIONS OF THE CONSUMER TRUST FUND CONCEPT AND CLEARLY ARE DESIGNED TO INDIRECTLY BENEFIT THE ABSENT CLASS MEMBERS

Some courts applying the cy pres doctrine to unclaimed damage funds in class action cases have focused on the nexus between the mission of the recipient organization and the consumer class affected by the statutory violation. Other courts have been more flexible in their approach and have made cy pres awards to general charitable and educational organizations with little or no nexus to the class and its injury. That said, *Amici* believe that there is a sufficient nexus between each of the recipient organizations and the class members in this case to justify a finding that all cy pres funds will benefit the silent class members.⁸ The remainder of this brief summarizes the types of organizations and uses for which cy pres distributions have been successfully awarded in the past.

⁸ It should be noted that on occasion reviewing courts have remanded a trial court's cy pres award, asking the court to consider whether a more appropriate recipient or use exists. Significantly, these courts have not invalidated the cy pres mechanism. See, e.g., *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (remanding for consideration of more appropriate recipient where reviewing court found Inter-American Foundation had no substantial record of service and did not limit its choice of projects); *In re Airline Ticket Commission Antitrust Litigation*, 307 F.3d 679 (8th Cir. 2002) (finding travel agencies, that were not class members but suffered from defendant's conduct, to be more appropriate cy pres recipients than National Association for Public Interest Law); *In re Folding Carton Antitrust Litigation*, 881 F.2d 494 (7th Cir. 1989) (finding use of unclaimed funds for foundation for research on complex antitrust litigation superfluous and ultimately approving plan to award unclaimed funds to the National Association for Public Interest Law to establish an Equal Justice Fellowship program).

In *Superior Beverage Co., Inc. v. Owens-Illinois, Inc.*, 827 F. Supp. 477 (N.D.Ill. 1993), the United States District Court for the Northern District of Illinois awarded unclaimed damages from an antitrust settlement involving sales of glass containers to fifteen existing educational, charitable and public service organizations. As to the scope and limits of the cy pres doctrine, the Court declared:

Historically, the cy pres concept was fairly limited and restricted to the closest comparable alternative to the original purpose for which the funds in question had been designated. . . . In recent years, the doctrine appears to have become more flexible. . . . We conclude from the foregoing that, while use of funds for purposes closely related to their origin is still the best cy pres application, the doctrine of cy pres and the courts' broad equitable powers now permit use of funds for other public interest purposes by educational, charitable, and other public service organization, both for current programs or, where appropriate, to constitute an endowment and source of future income for long-range programs to be used in conjunction with other funds raised contemporaneously.

Id. at 478-79. Among the cy pres grants awarded by the Court in *Superior Beverage* were distributions to four Illinois law schools for a criminal justice project, a minority recruitment program, a video program on legal ethics and an institute for consumer antitrust studies. In discussing its grant to the Loyola University Law School for the purpose of establishing an Institute for Consumer Antitrust Studies, the Court noted that this was the only one of its fifteen grants which bore direct relation to the antitrust source of the funds.⁹ "Even under the historic concept of cy pres, this application would clearly qualify," declared the Court in its opinion. *Id.* at 482. That grant is nearly identical to Judge Byron's cy pres award to the eleven law schools in this case. The only difference is that in *Superior*, an antitrust case, the funds were to be used to establish an Institute for Consumer Antitrust Studies, whereas in this case involving consumer

⁹ Several of the remaining cy pres distributees (e.g., the San Jose Museum of Art, the American Jewish Congress and a Chicago public television station) had little or no connection to the class members or the litigation source of the funds. See also *In re Motorsports Merchandise Antitrust Litigation*, 160 F. Supp. 2d 1392 (N.D. Ga.), where the Court adopted a flexible approach to disbursement of cy pres funds. There, the Court included The Make-A-Wish Foundation and the Susan G. Koman Breast Cancer Foundation as recipients of excess settlement funds.

fraud, Judge Byron ordered that the funds be used primarily to enhance studies in consumer protection law, which historically has and currently receives less academic and curricular attention than antitrust law. Thus, the grants to the eleven *Amici* bear the traditional nexus between the purpose of the grant and the indirect benefit to silent class members.

In *In re Folding Carton Antitrust Litigation*, No. MDL 250, 1991 WL 32867, at *1 (N.D. Ill. Mar. 6, 1991), *aff'd in part and remanded in part*, 934 F.2d 323 (7th Cir. 1991), the Northern District of Illinois granted and the Seventh Circuit approved the application of the cy pres doctrine to disburse a multi-million dollar unclaimed damage fund following settlement of an antitrust case. After three appeals and eight years of litigation, the Court approved a cy pres distribution to the National Association for Public Interest Law (NAPIL) to establish a permanent national fellowship program, which included student loan repayment assistance, another approved use of the funds in Judge Byron's order.

In trying to fashion a cy pres remedy to indirectly benefit a large absent class in a consumer case, courts frequently turn to legal aid clinics and other organizations which provide free legal service to low-income individuals. Their rationale is that consumers in a class action are often people who cannot afford to bring a private cause of action to remedy the wrong perpetrated on them. By funding organizations which provide legal services to the poor, cy pres awards seek to balance the inequity in the legal access scale. Hence, in *Jones v. National Distillers*, 56 F. Supp. 2d 355 (S.D.N.Y. 1999), the Court awarded the unclaimed funds from a securities fraud class action settlement to The Legal Aid Society, Civil Division. *Id.*; *see also Superior Beverage Co.*, 827 F. Supp. at 477 (awards to the Mandel Legal Aid Clinic at University of Chicago Law School, the Legal Aid Bureau of United Charities, the Legal Assistance Foundation of Chicago, the AIDS Legal Council of Chicago and the Chicago

Volunteer Legal Services); *Silva v. National Telewire Corporation*, No. 99-219-JD, 2001 WL 1609387 (D.N.H. Dec. 12, 2001) (award to the Legal Advice & Referral Center, Inc. in Concord, New Hampshire); *Drennan v. Van Ru Credit Corporation*, No. 96 C 5789, 1997 WL 305298 (N.D. Ill. June 2, 1997) (award to the Mid-Minnesota Legal Assistance Foundation); *Keele v. Wexler*, 149 F.3d 589 (7th Cir. 1998) (award to the Colorado Legal Aid Foundation). Indeed, in its April 1, 2004 order in *In re: MCI Non-Subscriber Telephone Rates Litigation*, M.L. Docket No. 1275, the United States District Court for the Southern District of Illinois, *sua sponte*, ordered that class counsel donate all sums remaining in the settlement fund after 90 days to Southern Illinois University School of Law. No restriction was placed upon that cy pres award.

Courts which take a more restrictive view of the cy pres doctrine insist that the distribution be targeted as much as possible to benefit the silent class members. In addition, courts favor uses which relate to the underlying litigation. In *Powell v. Georgia-Pacific Corporation*, 119 F.3d 703 (8th Cir. 1997), the Court affirmed a cy pres award of unclaimed damage funds to create scholarships for African-American high school students, where the underlying action was based upon defendant's employment discrimination against African-Americans twenty years earlier and in the same general locale. In that case, the Court noted the difficulties inherent in administering a settlement involving more than 2,000 class members, many of whom had relocated in the ten years since the original pay-out period. It explained:

[T]he district court was faced with a choice among 'second bests.' In this difficult situation, the court carefully weighed all of the considerations and tailored its remedy to reflect the parties' original intention regarding unclaimed funds. Although the plaintiffs may object to some of its particulars, the scholarship program balances the equitable interests involved in the case with the need to conserve judicial resources.

Id. at 707 The *Powell* case is also significant for its discussion regarding the “abuse of discretion” standard of review¹⁰ and for its caution that the trial court’s determination regarding cy pres distribution is entitled to a great deal of deference. *Id.*; *see also Boyle*, 820 A.2d at 567 (stating that the trial court’s determination is entitled to “great weight”).

In the case before this Court, the class consisted of purchasers of Defendant’s light cigarette products in the State of Illinois. Clearly, Judge Byron’s cy pres order was designed to benefit members of the class who are predominantly Illinois residents.¹¹ With the exception of the award to the American Cancer Society for research of tobacco related cancers, all of the other recipients are existing organizations dedicated to providing legal, educational and public services exclusively throughout Illinois. Of course, residents of Illinois clearly benefit from the American Cancer research, as well, which is specifically tailored to benefit the class in this case, smokers. The distribution to the law schools to enhance studies in the area of consumer protection is specifically tailored to benefit the class in this case, consumers. The distribution to the Illinois legal assistance foundations are tailored to indirectly benefit the class, members of the consuming public who generally do not have equal access to the legal system. The remaining distributions also serve to benefit the class in an indirect manner. Moreover, the Illinois Bar Foundation, the well-respected charitable arm of the Illinois State Bar Association, is appointed to serve as special master to receive, account, protect and distribute the funds. Finally, the Court specifically retained jurisdiction to “oversee the distribution of all unclaimed funds” in this case. (Judgment, p. 49). *Amici* submit to this Court that Judge Byron’s plan for cy pres distribution of the unclaimed compensatory damage funds in this monumental case is a

¹⁰ The Seventh Circuit also employed this standard in the case of *In re Folding Carton Antitrust Litigation*, 881 F.2d 494, 502 (7th Cir. 1989).

¹¹ The Seventh Circuit has suggested that cy pres distributions should be tailored to benefit the same geographic region affected by the statutory violations. *In re Folding Carton Antitrust Litigation* 881 F.2d at 502.

thoughtful, pragmatic, efficient order that is consistent with Illinois precedent and prevailing trends in application of the cy pres doctrine to consumer class action cases.

CONCLUSION

For the foregoing reasons, the goals of compensation, deterrence and disgorgement of illegal profits inherent in the Illinois Consumer Fraud and Deceptive Business Practices Act are better served by distribution of the unclaimed compensatory damage funds to indirectly benefit the absent class members than by reversion to the Defendant Philip Morris, Incorporated. The Court's selection of a variety of agencies which provide important statewide public services is an appropriate application of the cy pres doctrine in this case. While some of the benefits thereby conferred on class members are admittedly indirect, they nevertheless inure to the class members of this case, who are, by definition, defrauded consumers. Each of the *amici* law school recipients is a fully accredited law school with the ability and desire to accept the responsibility entrusted to it by Judge Byron in his Judgment. It should be affirmed by this Court.

Respectfully submitted,

DATED: July 12, 2004

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IN THE
SUPREME COURT OF ILLINOIS

SHARON PRICE and MICHAEL FRUTH, individually)	On Appeal from
and on Behalf of All Others Similarly Situated,)	the Circuit Court for the
)	Third Judicial Circuit
Plaintiffs-Appellees,)	Madison County
)	Cause No. 00-L-112
vs.)	
)	
PHILIP MORRIS INCORPORATED,)	The Honorable
)	Nicholas G. Byron
Defendant-Appellant.)	<i>Judge, Presiding</i>

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused 20 copies of the foregoing Brief of *Amici Curiae* in Support of Plaintiffs-Appellees and Appendix to be mailed to the Clerk of the Court on July 12, 2004, by depositing said copies, postage prepaid in a U. S. Post Office mailbox, with postage fully prepaid, to:

Juleann Hornyak
Clerk of the Court
Illinois Supreme Court
Supreme Court Building
Springfield, Illinois 62706

In addition, the undersigned hereby certifies that three copies of the foregoing Brief of *Amici Curiae* in Support of Plaintiffs-Appellees were served on counsel of record by causing same to be sent via overnight courier for next-day delivery on this 12th day of July, 2004, addressed to:

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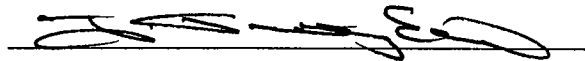
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A handwritten signature in black ink, appearing to be "H. Young", is written over a horizontal line.